STATE OF MICHIGAN

COURT OF APPEALS

DANIEL T. PETERSON,

Plaintiff-Appellant,

v

FIRST NATIONAL BANK OF WAKEFIELD and ANTON RINGSMUTH,

Defendants-Appellees.

UNPUBLISHED
June 28, 2011

No. 293967
Gogebic Circuit Court
LC No. 08-000368-CK

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Plaintiff Daniel Peterson commenced a breach of contract and negligent misrepresentation action against defendants, First National Bank of Wakefield and Anton Ringsmuth, bank president. Plaintiff now appeals as of right a circuit court order granting defendants summary disposition. We affirm.

In late March 2007, plaintiff apprised defendants of his nascent plan "to build a 45 unit assisted living facility on . . . property on Lake Gogebic," and suggested, "We have had a good working relationship in the past so I wanted to give you the opportunity to review my business plan and decide if your bank would like to get involved in this project." Ringsmuth answered in early May 2007 with the following email:

> . . . I have been looking over your business plan for your project. *The funding you need is more than our bank is allowed to lend to one customer*. This is a federal regulation that limits the amount we can lend based on the banks [sic] capital. We can lend up to 1.2 million to a single customer if we choose. So, the other option I have been looking into is a participation with another bank where they take a portion and we take a portion. Let me know how you feel about this or if you just want to go through SBA [Small Business Administration]. . . . [Emphasis added.]

The next morning, plaintiff replied:

> If you can put it together with one or two other banks I would prefer to go that way and keep it as local as possible. . . . As you probably know the SBA can be a pain to deal with plus it isn't free. I hired a financial consultant firm a while

> back who can set it up with some large national bank but the draw back is they get one percent of the deal when I sign. I have been holding off giving them the go ahead hoping something else would come along but I have to make a decision in the next couple of days so I can start construction and get this thing under roof before winter.
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> Let me know what you want to do as soon as possible. . . .

At some subsequent point, plaintiff emailed defendants, "The president of Miners State Bank, Paul Hinkson, and the owner of Concepts Consulting, Paul Arsenault, came to the site . . . to . . . take a look at the site. . . . Arsenault handles putting the deal together and everything to do with the SBA 504 program." Plaintiff added, "I believe they are going to fund the project and they asked if your bank wanted to be involved. I gave them your name and number and told them that you mentioned you could only go to 1.7 mil." Plaintiff concluded, "I'm not sure which one is going to get in touch with you but I wanted to give you a heads up that one of them probably will."

On July 13, 2007, Ringsmuth emailed plaintiff, "Sounds like everything is falling into place. *Yes we would be willing to get involved but we can only go up to a $1.2 Million and thats [sic] aggregate for one customer*. If I get a chance I will take a ride out there and see how its [sic] progressing." (Emphasis added). In a later, brief email, plaintiff notified Ringsmuth that "Arsenault from Concepts Consulting, the broker who is putting the senior living deal together with the SBA and Miners [B]ank said he was unable to make contact with you. . . . I told him you said your bank would participate to it's [sic] limit but I guess he needs to hear it from you. Here is his email address . . . ." Ringsmuth authored two emails on July 18, 2007, one to plaintiff advising, "I received the email [from Arsenault] today. I'm in Los Angeles for internet banking so I will email today to let him know *we would be interested in participating*." (Emphasis added). And a second to Arsenault similarly stating, "Sorry I haven't been able to reply to your message. I am in Los Angeles in meetings and *I will be interested in participating in the project*. I will be in the office on Monday so I will call you then."[1] (Emphasis added).

In an August 2, 2007 email from Arsenault to Kate Nelson, a Miners State Bank employee, Arsenault sent Nelson Ringsmuth's phone number and email address, and communicated that Arsenault "did not talk with [Ringsmuth] about the participation terms, so PJ

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[1] Arsenault's email to Ringsmuth summarized the following:

> I left a phone message for you earlier. Dan gave me your email. I am working with Miners State Bank to put an SBA 504 together to finance Dan's project. They would be willing to participate with you on the first mortgage. The total first is about $2.1 MM. They are willing to go 50/50 with you and take the lead putting the whole package together.
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> Please let me know your level of interest ASAP. I am leaving tomorrow for . . . a meeting . . . . I would like to move forward on this ASAP. . . . .

[Hinkson] has an open field." Later that evening, Nelson wrote in an email to Hinkson, in relevant part, "The president of Wakefield Bank needs to draft a letter of commitment to SBA. Paul A. says that he did not discuss with [Ringsmuth] the conditions of the participation. He left that open to you to negotiate." On October 19, 2007, Ringsmuth emailed plaintiff, "I haven't heard about the project for about two months so I'm not sure who is doing the funding and what banks are involved." Ringsmuth averred in an affidavit:

> 23. That neither the undersigned nor anyone at First National Bank of Wakefield has ever received a request from Miners State Bank or anyone else to issue a written loan commitment to Dan Peterson and/or Rosa Senior Living Corp. for purposes of an SBA 504 loan, and no such written loan commitment exists.
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> 24. That neither the undersigned nor anyone at First National Bank of Wakefield has ever received or otherwise discussed or negotiated the specific contractual terms of any Participation Agreement with Miners State Bank, as Lead Bank, and First National Bank of Wakefield, as Participant, relating in any manner to an SBA 504 loan to Dan Peterson and/or Rosa Senior Living Corp.
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> 25. That no Participation Agreement involving an SBA 504 Loan to Dan Peterson with Miners State Bank as Lead Bank and First National Bank of Wakefield as Participant has ever been authorized by First National Bank or its Board, and no such document has ever been signed by me or anyone else at First National Bank of Wakefield.

The parties agree that plaintiff borrowed from First National Bank of Wakefield $165,000 in 2003, $56,878 in 2004, $359,563.41 in 2006, and $785,821.17 in December 2007. The December 2007 loan to plaintiff consisted of a consolidation of his existing debts to First National Bank of Wakefield, and more than $257,000 in new debt. Ringsmuth's affidavit explained the genesis of a December 3, 2007 "participation certificate and agreement" between First National Bank of Wakefield and Miners State Bank in the amount of $128,962: "That based upon the amount of Peterson's outstanding debt, his assets and sound lending practices, Wakefield Bank, as Lead Bank, requested that Miners State Bank Participate in said [December 2007] loan to the extent of one-half of the "*new money*" added to Peterson's existing loans with First National Bank of Wakefield . . . ." (Emphasis in original).

Plaintiff ultimately filed a second amended complaint that set forth breach of contract and negligent misrepresentation counts. Defendants sought summary disposition under MCR 2.116(C)(7), (8) and (10), including on the bases that plaintiff had not proved the formation of a contract between him and defendants, and that the statute of frauds barred both counts of the complaint. After entertaining lengthy oral arguments by the parties, the circuit court employed the following pertinent logic in granting defendants' motion concerning the breach of contract count of plaintiff's complaint:

> . . . The plaintiff contends that the series of emails and the December 2007 loan document from The First National Bank to Mr. Peterson or his subchapter "S" Corporations I think collectively demonstrate a contract and thus provide a memorandum of an agreement sufficiently to overcome the statute of frauds. In

> this case it seems to me that these other documents are not adequate to satisfy the statute of frauds here. First, the signed note and that participation agreement in December of 2007 specifically applied to a given transaction, that is the lending of $785,821.17, notwithstanding the fact that the note states a purpose, quote, "The purpose of this loan is build complex," end quote, there is no reason to believe that this represented a larger deal on the part of the Wakefield Bank. Indeed, the Wakefield Bank demanded Miners [sic] participation even in this much, and this gives every indication that this 785 grand loan stands alone as a complete transaction rather than simply evidence of some greater participation. Its [sic] noteworthy here that this loan carries the signature . . . of Mr. Ringsmuth, so if it were otherwise it clearly would defeat the statute of frauds questions. The fact that it is not evidence of something greater necessarily is buttressed by the earlier October 2007 emails where Mr. Ringsmuth indicated that he had not heard about the project for two months so was not sure who was doing the funding or what banks were involved even. In other words, plaintiff here contends that the December signed note evidences the broader deal represented by the July and May emails from Ringsmuth saying Wakefield would be willing to get involved but we can only go up to one point two million and that's aggregate for one customer. I believe that's from the July 13 email in Exhibit E to the complaint. But the later October email shows no deal had been made by Wakefield. Ringsmuth didn't even know who was doing the funding so we cannot infer that the subsequent December loan was . . . part of any one point two million dollar package or any other evidence of any larger packaged deal than its own terms. And parenthetically, the SBA package sent to Mr. Ringsmuth in late October does not involve Wakefield directly in its terms. Now, again, I do not believe it's necessary in this or appropriate in this matter for this Court to try to fathom the lending limits of the Wakefield Bank under the code of Federal Regulations or otherwise. What is clear from the May 2007 email between the parties . . . and again in the July emails was that Mr. Ringsmuth indicated an interest in and intention to participate but could only go up to one point two million to a single customer if they so chose and that would be aggregate. That's the thrust of those emails. So . . . even if Mr. Ringsmuth was inaccurate about lending limits, that's what he thought and that's what he communicated. Again, . . . with regard to the December transaction then, if there was nearly eight hundred thousand out then and if, even with some 16 percent participation by Miners, and if Mr. Peterson had other outstanding debt of at least half a million he'd already . . . be up to and striking against those lending limits that Mr. Ringsmuth had communicated in the first place. . . .

The circuit court further elaborated that the statute of frauds in MCL 566.132(2) precluded the breach of contract[2] and negligent misrepresentation claims.

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[2] The circuit court discussed as follows the applicable statute of frauds:

(continued…)

Plaintiff initially contends that because a genuine issue of material fact existed regarding whether Ringsmuth made a promise or commitment to finance plaintiff's prospective assisted living facility, the circuit court improperly granted summary disposition. We review de novo a circuit court's summary disposition ruling.[3] *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

This Court has summarized as follows the basic elements of a contractual agreement:

> A valid contract requires mutual assent on all essential terms. Mere discussions and negotiation cannot be a substitute for the formal requirements of a

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> . . . There's a second reason why the chain of unsigned emails do not suffice. There is no indication of a scent [sic] to use email to memorialize a transaction under the Electronic Transactions Act. . . . Now, there is a second important consideration here. Subsection two of the Michigan Compiled Laws 566.132, which makes a special provision for financial institutions . . . , it specifically requires that the promise or commitment is in writing, a signed writing, rather than allowing for a note or memorandum or . . . presumably other evidence to suffice. . . . Now note the significant difference then between subsection two applicable to banks which says the promise or commitment must be in writing as opposed to subsection one which says the matter is void unless the agreement is in writing or a note or memorandum of the agreement or promise is in writing. There's additional language in subsection one. Am I being hyper technical here and too literal with this? Well, I think not. First of all, statutory interpretation requires that you give affect [sic] to all the words in the statute if it's possible to do so. . . . And as I further earlier noted that only documentation that really provides force to that is the signed loan agreement pertaining to building complex in December of '07, supported by the emails, and as I've earlier noted I do not believe it can be fairly evidenced of the particular deal. So it appears to me that the only signed deal here was regarding a loan for the $785,821 which obviously was consummated and the emails do not otherwise supply evidence of more.

[3] The circuit court apparently granted summary disposition pursuant to MCR 2.116(C)(7) (statute of frauds) and (10). Because our review of the relevant evidence does not uncover genuine issues of material fact necessary to support either count pleaded by plaintiff, we opt to consider the viability of plaintiff's claims exclusively under subrule (C)(10).

> contract. Before a contract can be completed, there must be an offer and acceptance. An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Acceptance must be unambiguous and in strict conformance with the offer. [*Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997) (internal quotation and citations omitted).]

"A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 454; 733 NW2d 766 (2006) (internal quotation and citation omitted).

The circuit court correctly found that, viewing the evidence in the light most favorable to plaintiff, he did not establish a genuine issue of material fact that defendants agreed to finance plaintiff's assisted living project. Taken together and viewed in an objective manner, the proffered emails and other relevant evidence show that the parties' discussions concerning First National Bank of Wakefield's involvement with plaintiff's project never extended beyond preliminary discussions or negotiations, which do not give rise to an enforceable agreement. *Eerdmans*, 226 Mich App at 364 ("Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract."); see also *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 194 Mich App 543, 549; 487 NW2d 499 (1992) ("A mere expression of intention does not make a binding contract."). In light of (1) the undisputed nature of plaintiff's pre-December 2007 First National Bank of Wakefield loans in excess of $500,000, (2) the undisputed fact that First National Bank of Wakefield consolidated plaintiff's existing loans and lent him an additional $257,000 in December 2007, and (3) Ringsmuth's explanation that "the amount of Peterson's outstanding debt, his assets and sound lending practices" necessitated participation[4] by Miner's State Bank for First National Bank of Wakefield to consummate the December 2007 loan to plaintiff, we agree with the circuit court's assessment that the December 2007 transaction constituted a transaction independent of any further First National Bank of Wakefield agreement or commitment to lend regarding the assisted living center. Our conclusion in this regard finds additional support in the absence of any concrete agreement by First National Bank of Wakefield to make the December 2007 loan the prelude to an additional more than $1 million line of credit for plaintiff's project. In summary, even when viewed in the light most favorable to plaintiff, we cannot conclude that the 2007 emails and the December 2007 loan documents comprised part of a larger promise or commitment to provide financing for

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[4] The United States Court of Appeals for the Sixth Circuit has summarized as follows the concept of lender participation:

> A participation is not a loan. To the contrary, a participation is a contractual arrangement between a lender and a third party whereby the third party, labeled a participant, provides funds to the lender. The lender, in turn, uses the funds from the participant to make loans to the borrower. The participant is not a lender to the borrower and has no contractual relationship with the borrower. [*In re AutoStyle Plastics, Inc*, 269 F3d 726 (CA 6, 2001).]

plaintiff's project. Consequently, the circuit court properly granted defendants summary disposition of the breach of contract count as a matter of law, MCR 2.116(C)(10), and we have failed to detect any impermissible findings of fact by the circuit court in ruling on the motion for summary disposition.[5]

Plaintiff additionally contests the trial court's summary disposal of his negligent misrepresentation claim on the basis that the statute of frauds precluded the enforcement of this claim, as well. "A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Unibar Maintenance Serv's, Inc v Saigh*, 283 Mich App 609, 621; 769 NW2d 911 (2009) (internal quotation and citation omitted). We again consider de novo the circuit court's summary disposition ruling. *Robertson*, 268 Mich App at 592.

The negligent misrepresentation count of plaintiff's second amended complaint focuses on Ringsmuth's incorrect representation, "[i]n a series of statements, emails and other communications . . . during the summer of 2007 that the First National Bank of Wakefield would loan to the plaintiff certain monies not to exceed $1.2 million." According to ¶ 22 of the second amended complaint, Ringsmuth's misrepresentations occurred "due to numerous acts of negligence":

> A. A failure to have information or become informed about the nature of an SBA 504 loan.
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> B. A failure by defendant Ringsmuth or . . . First National Bank of Wakefield to perform due diligence regarding knowledge of an SBA 504 program.
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> C. The failure of defendant Ringsmuth or any other representative of the First National Bank of Wakefield to advise the plaintiff that the $1.2 million cap on funds loaned to the plaintiff would be further reduced by funds already loaned to the plaintiff that were unrelated to the construction of the assisted living facility.
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> D. The failure of defendant Ringsmuth or any other representative of the First National Bank of Wakefield to advise the plaintiff that they were, in fact, not going to loan the plaintiff any additional monies beyond the $785,821.17 that had already been loaned by a date on or about December 3, 2007 despite a clear legal duty to so advise the plaintiff.

Our review of the record reveals that plaintiff has presented no evidence tending to establish a genuine issue of material fact with respect to any failure by defendants to become

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[5] Because we find dispositive plaintiff's failure to show that defendants promised or committed to finance his assisted living project, we need not address whether Ringsmuth had the apparent authority to commit First National Bank of Wakefield to the financing.

informed about the nature "of an SBA 504 loan." The record also substantiates that contrary to plaintiff's assertions in ¶ 22C, Ringsmuth consistently repeated to plaintiff the bank's adherence to a $1.2-million loan cap, and Ringsmuth emphasized in July 2007 "thats [sic] aggregate for one customer." Concerning ¶ 22D, plaintiff cites federal law in support of the proposition that defendants owed and violated a clear legal duty relating to notification of credit extension: "Within thirty days . . . after *receipt of a completed application for credit*, a creditor shall notify the applicant of its action on the application." 15 USC 1691(d)(1) (emphasis added). However, plaintiff concedes that he submitted "no formal application" to defendants, rendering the plain language of § 1691(d)(1) inapplicable. We conclude that summary disposition of plaintiff's negligent misrepresentation claim qualified as proper under MCR 2.116(C)(10), and thus affirm the circuit court's summary disposition ruling, albeit on different grounds. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005) (observing that "even if a trial court errs in granting summary disposition under the wrong subrule, this Court may review the issue under the correct subrule," and that "this Court will not reverse a trial court's decision if the correct result is reached for the wrong reason").

Affirmed.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher